

HONORABLE ROBERT S. LASNIK

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRUCE KEITHLY and DONOVAN  
LEE, Individually and on Behalf of all  
other Similarly Situated,

Interim Lead Plaintiffs,

vs.

INTELIUS INC., a Delaware  
Corporation; and INTELIUS SALES,  
LLC, A Nevada Limited Liability  
Company,

Defendant and  
Third Party Plaintiffs,

vs.

ADAPTIVE MARKETING, LLC, a  
Delaware Limited Liability Company,

Third Party Defendant.

Case No. C09-1485-RSL

DEFENDANTS' RESPONSE TO  
PLAINTIFFS' PROPOSED SURREPLY  
TO DEFENDANTS' REPLY  
SUPPORTING MOTION FOR  
SUMMARY JUDGMENT DISMISSING  
BRUCE KEITHLY'S CONSUMER  
PROTECTION ACT CLAIM

Noted for: June 10, 2011

DEFS' RESPONSE TO PLTF'S PROPOSED  
SURREPLY RE MOTION FOR SUMMARY  
JUDGMENT DISMISSING KEITHLY'S CPA  
CLAIM

Case No.: C09-1485 RSL

LAW OFFICES  
DANIELSON HARRIGAN LEYH & TOLLEFSON LLP  
999 THIRD AVENUE, SUITE 4400  
SEATTLE, WASHINGTON 98104  
TEL., (206) 623-1700 FAX, (206) 623-8717

1 Plaintiffs' proposed Surreply asks the Court to strike two portions of Intelius' reply  
 2 brief, in which Intelius pointed out the factual and legal fallacies in Plaintiffs' intended means  
 3 of proving the causation element of their Consumer Protection Act claim for the class  
 4 members. Surreply at 1-3.

5 First, Plaintiffs object that Intelius should have confined itself to addressing proof of  
 6 causation for Keithly individually, rather than for the class as a whole, and that Intelius'  
 7 argument prematurely responded to Plaintiffs' pending motion for class certification. Surreply  
 8 at 2. Plaintiffs argue that Intelius improperly raised its responsive argument for the first time  
 9 in its reply brief on this summary judgment motion. Surreply at 2.

10 Plaintiffs' motion to strike should be denied. This portion of Intelius' Reply directly  
 11 responds to pages 16-17 of Plaintiffs' opposition brief on this motion, where Plaintiffs  
 12 explicitly presented and argued the theory by which Plaintiffs intend to establish causation for  
 13 Keithly and for the class:

14 The Washington Supreme Court has repeatedly affirmed that reliance is not an element  
 15 of a CPA claim, but rather is one type of proof that could be used to establish  
 16 causation. . . . Here, Plaintiffs, acting for the Class, can establish the causal link  
 17 between Intelius's actions and the Class's injuries using records showing that Class  
 18 members did not enable the member-enabled benefits for the subscription services.  
 19 Plaintiffs will also rely on payment records, statistical evidence drawn from data  
 showing how customers navigated the Intelius site (collected by Intelius), and Intelius's  
 and Adaptive's sales, fulfillment, and customer service records. Individual evidence  
 (i.e., testimony) of reliance will not be offered a proof.

20 Plaintiffs' Opp. at 16-17 (citation omitted; emphasis added). Plaintiffs stated that Keithly's  
 21 causation proof would parallel that of the class. The opposition properly addressed this issue.  
 22 *Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990) (party's reply brief may  
 23 address an issue raised in the opposing party's opening brief).

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 DEFS' RESPONSE TO PLTF'S PROPOSED  
 SURREPLY RE MOTION FOR SUMMARY  
 JUDGMENT DISMISSING KEITHLY'S CPA  
 CLAIM - 1

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 DANIELSON HARRIGAN LEVY & TOLLEFSON LLP  
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Second, Plaintiffs argue that Intelius' Reply brief improperly raises for the first time the point that Keithly "knew that he was enrolling in a Free Trial of IDP." Surreply at 3, paraphrasing Intelius Reply at 5-6, 11-12. Again, Plaintiffs' opposition brief made that same assertion—in fact, Plaintiffs' Surreply cites their own opposition brief. Surreply at 3, citing Pl. Opp. at 20. Plaintiffs' opposition brief stated:

Mr. Keithly testified that, in his experience as a consumer, free trials are truly free, and that when a free trial ends, the consumer has to take affirmative steps to enroll in a service. . . . Mr. Keithly explained . . . : "[O]ther than seeing that [Identity Protect] didn't cost anything and that it was a trial, not a purchase, I just went on my way. . . . It's a trial, it doesn't cost anything, go onto the next page. . . ."

Pl. Opp. at 20-21. The Opposition addressed this assertion, which directly contrasts with Plaintiffs' theory of causation stated in that same brief—that all the Plaintiffs were unaware that any second product – *i.e.*, Identity Protect – was involved in their transactions at all:

Plaintiffs' theory is that they were tricked into paying for something that they did not want or receive, and did not use. It is reasonable to assume that a customer did not intend to purchase a product like IDP if he never took steps to make sure the product would actually work. . . . Indeed, Intelius knows that Mr. Keithly never used IDP.

Opp. at 18.

Plaintiffs' motions to strike should be denied.

DATED this 22<sup>nd</sup> day of June, 2011.

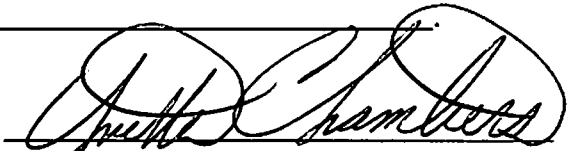
DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By s/Arthur W. Harrigan, Jr.  
 Arthur W. Harrigan, Jr., WSBA #1751  
 Christopher Wion, WSBA #33207  
 Attorneys for Defendants Intelius Inc.  
 and Intelius Sales Company, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Mark A. Griffin, Karin B. Swope, Harry Williams IV and Keller Rohrback L.L.P.; Andrew N. Friedman, Victoria S. Nugent, Whitney R. Case and Cohen Milstein Sellers & Toll P.L.L.C.; Cori Gordon Moore, Thomas L. Boeder and Perkins Coie LLP

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: \_\_\_\_\_

  
Yvette Chambers